

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAR 24 1997

In the Matter of)

Implementation of the)
Telecommunications Act of 1996:)
Telemessaging, Electronic Publishing,)
and Alarm Monitoring Services)

CC Docket No. 96-152

PETITION FOR RECONSIDERATION AND CLARIFICATION

Pursuant to Section 1.429 of the Commission's Rules, AT&T Corp. ("AT&T") hereby requests that the Commission reconsider or clarify its First Report and Order¹ in this proceeding in two respects: First, the Commission should reconsider the Order's overly narrow interpretation of § 274(b)'s mandate that BOCs' separated affiliates and electronic publishing joint ventures "operate independently." Both the plain language of § 274(b), and the Commission's prior interpretations of that phrase compel the conclusion that Congress intended that provision to impose separate substantive requirements in addition to the specific terms provided by sections 274(b)(1) through (b)(9). Second, the Commission should clarify that, as required by the nondiscrimination requirements of § 274(b)(3)(B), if a BOC provides "inbound telemarketing or

¹ First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, FCC 97-35, released February 7, 1997 ("Order").

referral services” for a separated affiliate or electronic publishing joint venture, it must do so pursuant to publicly available written contracts.

I. THE COMMISSION SHOULD RECONSIDER ITS INTERPRETATION OF SECTION 274(B)’S REQUIREMENT THAT A SEPARATED AFFILIATE OR ELECTRONIC PUBLISHING JOINT VENTURE “OPERATE INDEPENDENTLY”

Sections 274 and 272 of the 1996 Act impose closely analogous separation requirements intended to protect against the risk that the BOCs would use any market power they retain when they enter previously prohibited markets to engage in discrimination, cost misallocations, and price squeezes that harm competition and customers. Indeed, the purpose and structure of the two sections are so similar that the Order expressly permits BOCs to use the same affiliate to provide the services covered by both provisions.²

Sections 274(b) and 272(b)(1) both mandate that the respective BOC affiliates they require must “operate independently.”³ In its § 272 order, the Commission readily concluded that the use of that phrase in § 272(b)(1) imposed substantive separation requirements in addition to that provision’s other specific requirements.⁴ However, in the instant Order the Commission found that the identical phrase has no independent meaning, but is fully implemented by the

² See Order, ¶ 110 (“[A] BOC may provide electronic publishing services and section 272 services through the same entity or affiliate.”)

³ Section 272(b)(1) requires that affiliates established pursuant to that section “shall operate independently,” while § 274(b) mandates that separated affiliates and electronic publishing joint ventures “shall be operated independently.”

⁴ First Report and Order and Further Notice of Proposed Rulemaking, Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934, as Amended, CC Docket No. 96-149, FCC 96-489, released December 24, 1996, ¶ 156 (“Section 272 Order”).

limited requirements of sections 274(b)(1) through (9); despite the fact that these subsections impose different restrictions than those the § 272 order found were required by § 272(b)(1). The only justification the Order offered for these radically differing interpretations was that “[t]he ‘operated independently’ requirement in section 274(b) is followed by nine substantive restrictions that we read as the criteria to be satisfied to ensure operational independence ...,” while §272(b) used the phrase as one of a list of five requirements that the Commission stated, without giving reasons, were “separate substantive requirements.”⁵

As a preliminary matter, this terse explanation does not amount to a reasoned basis for the Commission’s interpretation.⁶ Moreover, the structure of § 274(b) clearly indicates that Congress intended the “operated independently” requirement as an independent substantive restriction. That provision is placed in a separate sentence at the head of § 274(b), and is phrased as an independent and distinct mandate: “A separated affiliate or electronic publishing joint venture shall be operated independently from the Bell operating company.” The section then goes on to provide that, in addition: “Such separated affiliate or joint venture and the Bell operating company with which it is affiliated shall” adhere to the specific requirements of subsections (b)(1) through (b)(9).

⁵ Order, ¶ 65. The Section 272 Order offered only this same rationale, ¶ 157.

⁶ See generally AT&T Petition For Reconsideration, filed February 20, 1997, at pp. 6-8, in First Report and Order and Further Notice of Proposed Rulemaking, Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934, as Amended, CC Docket No. 96-149, FCC 96-489, released December 24, 1996 (“AT&T § 272 Petition”).

In addition, as the Order recognized, some of the requirements of subsections (b)(1) through (b)(9) expressly apply only to a BOC's separated affiliate, and not to an electronic publishing joint venture.⁷ Thus, if the "operate independently" requirement is in fact defined by sections (b)(1) through (b)(9), then that phrase must have a different meaning when applied to each category of affiliated entities under § 274. This is an unnatural and awkward reading of the statute -- made even more so by the Commission's ruling that the § 272 "operate independently" requirement has a third meaning. Compounding the confusion still further, the Order does not account for the fact that the Commission's rules have for years provided a settled interpretation of "operate independently" that differs from the three readings it has given that phrase in the 1996 Act. Clearly it is far more reasonable to construe both § 272(b)(1) and § 274(b) to require affiliates and joint ventures to adhere to the same substantive requirement of "operational independence," which should be construed according to the plain meaning of that phrase.⁸

The Commission's decision to give "operate independently" substantive effect in the context of § 272, but not in § 274, conflicts with the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same

⁷ See Order, ¶ 63.

⁸ Paragraph 64 of the Order "reject[s] the argument that Congress did not grant the Commission the authority" to adopt restrictions in addition to those specified in § 274(b)(1) through (b)(9). This contention flatly contradicts the Order's statement earlier in the same paragraph that it also "reject[s] the ... argument that the phrase 'operated independently' is a separate substantive restriction" Plainly, if the Commission has authority to impose additional separation requirements pursuant to § 274(b), then the source of that authority can only be the "operate independently" requirement.

meaning.”⁹ Moreover, the Supreme Court has held that when the statutory provisions in question appear in “close proximity” or are “interrelat[ed],” this presumption is heightened.¹⁰ The Commission’s oblique observation that § 274(b) appears in a list with nine other requirements, while § 272(b)(1) is part of a list of five restrictions, simply is not adequate to overcome this strong presumption.¹¹

As AT&T showed in its petition for reconsideration of the § 272 order, by its plain language the phrase “operate independently” at minimum prohibits BOCs and their affiliated entities from engaging on an integrated basis in the functions essential to the provision the services subject to separation requirements.¹² No reasonable interpretation of § 274(b) admits the conclusion that the nine restrictions in subsections (b)(1) through (b)(9) alone are consistent with the ordinary meaning of that phrase. For example, if “operate independently” has no substantive content beyond the mechanical requirements of separate books, separate officers, separate

⁹ E.g., Gustafson v. Alloyd Co., 115 S. Ct. 1061, 1067 (1995); Department of Revenue of Oregon v. ACF Indus., 114 S. Ct. 843, 845 (1994).

¹⁰ Commissioner of Internal Revenue v. Lundy, 116 S. Ct. 647, 655 (1996); see also Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (fact that two welfare programs have a “substantial relation” is further evidence that “identical words used in different parts of the same act are intended to have the same meaning”).

¹¹ Cf., e.g., Bowman Transp., Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974) (agency must provide a “rational connection between the facts found and the choice made”). AT&T does not contend that the Commission necessarily is bound to adopt the same construction of “operate independently” in both sections 272 and 274. The Commission is, however, required to give an adequate, reasoned basis if it concludes that the phrase has a different meaning in each of the two sections. See AT&T § 272 Petition, p. 7.

¹² See AT&T § 272 Petition, pp. 3-4.

personnel and separate facilities, then the officers and personnel of a BOC and its § 274 affiliate presumably could work together to leverage the BOC's local exchange monopoly to disadvantage competitors and consumers -- so long as they did so in ways that are within the letter of subsections (b)(1) through (b)(9).

It is equally clear that it would be inconsistent with the plain meaning of § 274(b) for a BOC and its § 274 affiliate or joint venture to conduct core functions through a third BOC affiliate. Section 274(b) unequivocally requires independent operation, not merely the maintenance of separate corporate shells. Thus, the Commission should clarify that the Order's statement that a parent company or another affiliate may perform "administrative and corporate governance functions"¹³ may not be interpreted so as to swallow the independent requirement of operational independence.

Finally, the Commission's Order fails to adequately consider the interpretation that it has long given "operated independently" in its Computer Inquiry and cellular structural separation rules.¹⁴ It is a fundamental principle of administrative law that

A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.¹⁵

Thus, the Supreme Court has made clear that "an agency changing course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when

¹³ Order, ¶ 86.

¹⁴ See 47 C.F.R. §§ 22.903(b) & 64.702(c)(2).

¹⁵ Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1973).

an agency” adopts that course in the first instance.¹⁶ Although the Commission invited comment on the relevance of its existing separation regimes, the Order’s statement of its rationale virtually ignores those rules and the Commission decisions interpreting them.

It is all the more important that the Commission distinguish its prior precedents in light of the fact that the Order flatly contradicts them in some places. For example, the Order concludes that the prohibition against the joint ownership of property in § 274(b)(5) does not extend to leaseholds or the shared use of property.¹⁷ However, the Commission has previously ruled that: “In order for a separate subsidiary to operate independently it must have its own physical space separate and distinct from any space occupied by its corporate affiliates.”¹⁸ Similarly, although the Order permits the sharing of “administrative and corporate governance functions,”¹⁹ an earlier Commission decision holds that the “operate independently” requirement’s mandate for separate personnel “would be substantially undermined” if an AT&T division with its own accounting system provided even word processing, secretarial or other clerical services to a separate affiliate, because such functions would “directly support the day-to-day operations of the business enterprise.”²⁰ The Commission must, at minimum, explain why activities that fit within

¹⁶ MVMA v. State Farm, 463 U.S. at 43.

¹⁷ Order, ¶ 85.

¹⁸ Memorandum Opinion And Order, American Information Technologies Et Al., Capitalization Plans For The Furnishing Of Customer Premises Equipment And Enhanced Services, 102 F.C.C.2d 1089, released February 4, 1985, ¶ 54 (emphasis added).

¹⁹ Order, ¶ 86.

²⁰ Memorandum Opinion And Order, American Telephone and Telegraph Company Report On Services To Be Shared Between Fully Separated Subsidiary And Affiliated Companies And Associated Costing Methodology, 92 F.C.C.2d 676, ¶¶ 42-43 (1982).

its undefined category of “corporate governance and administrative functions” do not raise the same concerns that were implicated by the sharing of services under its prior separation decisions.

II. **THE COMMISSION SHOULD CLARIFY THAT “INBOUND TELEMARKETING OR REFERRAL SERVICES” MUST BE PROVIDED PURSUANT TO PUBLICLY AVAILABLE WRITTEN CONTRACTS OR TARIFFS**

AT&T also requests that the Commission clarify what appears to be an inadvertent ambiguity in the Order. Paragraph 150 of the Order states that “A BOC may choose to provide inbound telemarketing or referral services either pursuant to a contractual arrangement or during the normal course of its inbound telemarketing operations.” (emphasis added). Pursuant to § 274(b)(3)(B), a BOC may not carry out any “transaction” with its separated affiliate or electronic publishing joint venture except, inter alia, “pursuant to written contracts or tariffs that are filed with the Commission and made publicly available” Although the Commission’s FNPRM in this proceeding requests further comment on the meaning of the term “transaction” as used in § 274(b)(3)(B),²¹ it is plain that any agreement between a BOC and a § 274 affiliate or joint venture pursuant to which the BOC provides inbound telemarketing and referral services would implicate § 274(b)(3)(B).²² Therefore, the Commission should clarify that its statement in paragraph 150 was not intended to suggest that a BOC could provide such services to a § 274 separated affiliate or joint venture under any circumstances except pursuant to a written contract or a publicly filed tariff.

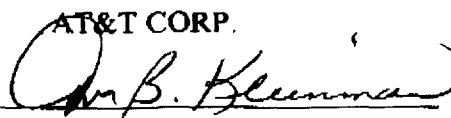
²¹ Order, ¶ 251.

²² See id. (noting Commission’s prior conclusion that agreement between a BOC and its § 272 affiliate to transfer unbundled network elements or facilities pursuant to “explicit terms and conditions” would constitute a transaction).

CONCLUSION

For the foregoing reasons, the Commission should reconsider and clarify its First Report and Order in CC Docket No. 96-149, as set forth above.

Respectfully submitted,

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